STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

TROY ANTHONY BARLOW

Defendant-Appellant.
_____/

Supreme Court No. _____

Court of Appeals No. 239038 op 9/11/3

Lower Court No. 01-2179FH

Calhoun
C. Sundt

CALHOUN COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

DOUGLAS W. BAKER (P49453)
Attorney for Defendant-Appellant

124965

NOTICE OF HEARING

APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE

BY: DOUGLAS W. BAKER (P49453)
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3300 Penobscot Building
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-vs-

TROY ANTHONY BARLOW

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Supreme Court No. _____

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NOTICE OF HEARING

TO:

CALHOUN COUNTY PROSECUTOR
161 E. Michigan Avenue
Battle Creek, MI 49014-4066

PLEASE TAKE NOTICE that on **December 2, 2003**, the undersigned will move this Honorable Court to grant the within

APPLICATION FOR LEAVE TO APPEAL

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____

DOUGLAS W. BAKER (P49453)
Assistant Defender
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645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Date: November 5, 2003

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

The defendant-appellant, Troy Anthony Barlow, appeals from a September 11, 2003, unpublished opinion of the Court of Appeals (attached as Appendix A to this Application). The Court of Appeals affirmed Mr. Barlow's conviction for fourth-degree criminal sexual conduct (CSC IV). The conviction was entered after a jury trial in Calhoun County Circuit Court before Judge Conrad Sindt.

Mr. Barlow's appeal involves two legal issues of major significance to the state's jurisprudence. The first concerns the amount of force needed to accomplish a forcible sexual act. In People v Carlson, 466 Mich 130, 140 (2002), this Court held that the necessary force must be more than that which is incidental to the sex act itself; it must be force sufficient to induce submission by the victim or to seize control of him or her. Here, the Court of Appeals held that Mr. Barlow "forcibly" touched the complainant's breast not because he used some force other than the touching to accomplish it, but simply because the complainant sought to move away from the contact. The Court's ruling flies in the face of Carlson. This Court should grant leave in order to clarify Carlson's meaning, or, in the alternative, should remand for reconsideration in light of Carlson.

The second concerns the "implied coercion" theory of criminal sexual conduct. The statute under which Mr. Barlow was convicted proscribes sexual contact by force or coercion. The Court of Appeals has previously ruled that coercion may, at least in some exceptional cases, be implied. People v McGill, 131 Mich App 465 (1984). The Court of Appeals held, in the alternative, that Mr. Barlow committed sexual contact by implied coercion. Mr. Barlow asks this Court to consider for the first time whether, and under what circumstances, coercion to engage in sexual conduct may be implied. McGill carefully limited an implied-coercion theory to facts like

its own, in which a thirteen-year-old girl was driven to a remote location by an adult man who informed her he had been in jail and touched over her protestations. Here, by contrast, the complainant was a seventeen-year-old who voluntarily accompanied Mr. Barlow to his apartment and never told him not to touch her.

Mr. Barlow asks this Court to grant leave to appeal or such other relief as it deems appropriate.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____

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Date: November 5, 2003

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, COURT RULES

STATEMENT OF QUESTION PRESENTED

I. DID THE COMPLAINANT'S TESTIMONY FAIL TO ESTABLISH THAT TROY BARLOW USED FORCE OR COERCION TO ACCOMPLISH THE SEXUAL CONTACT UNDERLYING THE CHARGE, AND IS MR. BARLOW'S CONVICTION OF FOURTH-DEGREE CRIMINAL SEXUAL CONDUCT THUS UNSUPPORTED BY SUFFICIENT EVIDENCE?

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

The defendant-appellant, Troy Barlow, stood trial in Calhoun Circuit Court on one count each of third- and fourth-degree criminal sexual conduct (CSC).[1] A jury deliberated for half of one day and most of the next, at one point declaring itself hung, before finally acquitting Mr. Barlow of the third-degree CSC charge but convicting him of the fourth-degree charge. Judge Conrad Sindt, who had presided over the trial, thereafter sentenced Mr. Barlow to serve two-to-four years as a third felony offender.[2]

Mr. Barlow appealed by right, arguing that the evidence to support the fourth-degree-CSC conviction was legally insufficient. In an unpublished per curiam opinion filed September 11, 2003, the Court of Appeals rejected his argument and affirmed his conviction. Mr. Barlow now seeks leave of this Court to appeal.

Overview

The seventeen-year-old complainant, Ellen Howard, and her best friend, Dawn Marty, met the defendant-appellant, Troy Barlow, at a party. Mr. Barlow asked for a ride home, and Ms. Marty obliged. Ms. Howard went with them. They stopped on the way, and Mr. Barlow bought several wine coolers. Ms. Marty and Ms. Howard accompanied Mr. Barlow to his upstairs apartment, where the three of them drank and played computer games. Mr. Barlow and Ms. Howard went into a bathroom, and he touched her clothed breasts. Ms. Marty left to pick up and bring back some fast food. At Mr. Barlow's request, Ms. Howard returned to the bathroom, took off her clothes, and emerged naked. Mr. Barlow and two male friends, who had stopped to visit, watched. According to Ms. Howard, Mr. Barlow touched her genitals.

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[1] MCL 750.520d; MCL 750.520e.
[2] Mr. Barlow's prior convictions were not for sex offenses. II 22-23; 32-33.

When she heard Ms. Marty returning with the food, Ms. Howard dressed. They ate. Ms. Marty left again, and Mr. Barlow and Ms. Howard went to his bedroom, where the two of them had sexual intercourse. Soon after, he asked her to leave, saying that house rules forbade overnight guests. According to Ms. Howard, Dawn Marty returned once again and Ms. Howard once more asked her for a ride home, but Mr. Barlow blocked her path down the stairs, and Ms. Marty laughed and left. Mr. Barlow denied such an incident,[3] but there was no dispute that Mr. Barlow ultimately called a cab for Ms. Howard and paid for her ride home.

Ms. Howard instructed the cab to stop at a party store, and called her mother. During an emotional discussion (defense counsel would ask the jury to infer that Dawn Marty had already informed Ellen Howard's mother of the sexual encounter, III 76[4]), Ms. Howard claimed that she was raped.

At trial, Ellen Howard testified that she voluntarily went to Troy Barlow's bedroom and sat on his bed, but that she did not consent to sex. Instead, she claimed, Mr. Barlow accomplished intercourse with her by holding her down with one hand while, with just his free hand, he pulled her pants and his own down, then unwrapped and put on a condom. She tried to push him away but was paralyzed with fear, she said. On cross-examination she claimed for the first time to have also told Mr. Barlow no.

Ms. Howard did not claim that Mr. Barlow had used force or threats when in the bathroom and kitchen he had touched her breasts and genitals. She did not even claim to have told him no at that point. Instead, she said she submitted to his touches because she was afraid. She suffered from panic attacks.

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[3] Dawn Marty did not testify. The prosecutor said he could not locate her, though he admitted his efforts were less than diligent. III 15.

[4] References to the trial transcript are denoted by volume and page number only. (Volume I is the transcript of the proceedings of November 13, 2001.)

Both the third-degree and fourth-degree CSC charges were premised on the theory that Mr. Barlow "forced or coerced" the sexual penetration and sexual contact. The prosecution theorized that the evidence of sex in the bedroom proved the third-degree charge, and that the touchings in the bathroom and/or kitchen proved the fourth-degree charge. After the evidence was in, defense counsel moved for a directed verdict on the fourth-degree charge, arguing that the prosecution had not proved "force or coercion" in either the bathroom or kitchen incidents. III 57-58. The trial judge denied the motion.[5] III 58-59.[6]

The jury ultimately acquitted Troy Barlow of third-degree CSC, but convicted him of fourth-degree CSC. On appeal, Mr. Barlow makes the same argument he made below on the directed-verdict motion: the prosecution failed to prove that he used force or coercion to accomplish the touchings in the bathroom or kitchen.

The prosecution case—the complainant's testimony

On February 5, 1999, Ellen Schaeffer, nee **Ellen Howard**, was 17 years old. II 36. On that day, in the early evening, she went with Dawn Marty to a house on Van Buren Street in Battle Creek to visit a friend of Dawn's. II 37. Dawn Marty was Ellen Howard's best friend, more like a sister than a friend. II 37. There were five to ten people at the house, including Troy Barlow, who was a stranger to her. II 38-39. After about an hour, Mr. Barlow asked Dawn Marty for a ride home, and she agreed. II 41-42. Ms. Howard, who had been a passenger in Ms. Marty's car on the ride over, went with them. II 42.

On the way, they stopped at a market, where Mr. Barlow bought some wine coolers. II 42-43. They then proceeded to Mr. Barlow's home, an upstairs apartment on Fremont Street.

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[5] The transcript pages disclosing the judge's reasons are included as an appendix to this brief.

II 44. Ellen Howard, dependent on Dawn Marty for a ride home, went with Dawn and Mr. Barlow to Mr. Barlow's apartment. II 45. Inside the apartment were two men. II 45. Ms. Howard was "little nervous and afraid," but she nonetheless began to drink a wine cooler and look at a laptop computer that was sitting on the kitchen counter. II 47-48.

After five to ten minutes of this (II 48), Ms. Howard went into the bathroom with Dawn Marty and Troy Barlow (II 50). She did not remember why they all went into the bathroom, or whether she went willingly. II 50. (On cross-examination, she admitted that she would have remembered being forced to go into the bathroom. II 96.) In the bathroom, Mr. Barlow began to "grope on" her chest, over her clothes (II 51), while Dawn Marty watched (II 52), smiling (II 99). Ms. Howard did not tell him to stop (or at least she did not remember doing so). II 104. She was "uncomfortable," though, and would have left, but Dawn was between her and the bathroom door. II 52. In retrospect, she thought she "should of" pushed Dawn aside. II 52. Troy Barlow did *not* try to keep her from leaving. II 102. She ended up leaving after Dawn Marty left, when Troy Barlow tried to touch Dawn. II 52.

Back in the kitchen, Ms. Howard began looking at the computer again, playing video games. II 105-06. Within fifteen minutes or half an hour (II 108), Dawn Marty left for Burger King to pick up some food. II 54. Ms. Howard wanted to go, too, but Dawn said "No, you'll be fine, just stay here." II 54. Ms. Howard did not insist on going. II 54, 108.

While Dawn Marty was away, Mr. Barlow asked Ms. Howard to return to the bathroom. II 55. She went with him. II 55. She did not refuse because she was afraid; she thought she might "get hurt or killed" if she said no (II 55), even though Troy Barlow was nice to her

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[6] When counsel asked for the judge to charge fourth-degree CSC as a lesser included offense of the third-degree charge, the prosecution objected and the judge again refused, saying of the bedroom-incident evidence that "there's really no competent evidence in this entire record on that issue that would suggest it was merely contact and not penetration." III 60.

(II 112). She testified that when she becomes afraid, which happens "in some circumstances," she has panic attacks. II 114; II 62.

In the bathroom, Mr. Barlow asked her to "get naked and come back out to the kitchen." II 56. He then returned to the kitchen. II 110. She didn't want to undress, but she did. II 56. She reentered to the kitchen, naked, and the three men looked at her. II 57. Told to "lean over a chair and bend over," she did; again, she was afraid not to (II 57-58). Troy Barlow began "poking" at her "genital area." II 58. There was no penetration. II 59.

The noise of a door opening downstairs signalled Dawn Marty's return from Burger King. II 60. Troy Barlow told Ms. Howard to get dressed. II 60. She ran to the bathroom, dressed, and returned to the kitchen. II 60.[7] When Dawn came in, she took her aside (II 62) and told her "We need to leave, now." II 61. Dawn said no. II 61. Ms. Howard told Dawn that she'd been forced to get naked (II 61); still Dawn, her best friend, insisted on staying a while longer (II 63). Dawn said not to worry, that they would leave soon. II 63. It was dark out, and the neighborhood was rough, so Ms. Howard decided to wait. II 61.[8] She ate some food (II 116) and played with the others on the computer some more (II 120).

After a while, Dawn Marty left, but Ellen Howard did not go with her. II 63. Ms. Howard did not see Dawn leave. II 120. She did not remember Dawn trying to get her to go with her. II 121.

Troy Barlow's two male friends were now gone, too. II 64. Ms. Howard and Mr. Barlow were alone. He told her he wanted to show her his bedroom. II 64-65. She went to his bedroom; she couldn't remember how she got there. II 65. He didn't drag her. II 123. She sat

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[7] She must have done so very quickly, indeed, because she testified that she had dressed completely and was already back in the kitchen area before Dawn Marty made it up the flight of stairs. II 60.

down on his bed. II 66. She did so of her own volition (II 66); he didn't force her to (II 125). The next thing she remembered was laying down; she couldn't remember "if it was by will or what." II 66. He was on top of her. II 66. She tried to push him off, but he held her down with one hand while he pulled her pants down with the other. II 126; II 67. While still holding her down (II 168-169), he pulled his own pants down (and perhaps off), too. II 69. Without taking the hand that was holding her down off of her shoulder, he managed to use his free hand to unwrap and put on a condom. II 168-169. He then put his penis inside her vagina and had intercourse with her. II 71.

Ms. Howard admitted that Mr. Barlow never made any threats. II 130. On cross-examination, she claimed for the first time that, while in the bedroom trying to push him off her, she said "No," "two to three times." II 126.

Afterwards, she got dressed and just stood there. II 72. Though Mr. Barlow had left the room (II 130) and a telephone was within reach, she did not use it (II 131).

Dawn Marty returned yet again, and Troy Barlow went to the door. II 72; II 134-35. Ms. Howard pleaded with Dawn not to leave her, and even tried to slide down the stairs past Mr. Barlow, who was blocking the way, but Dawn just laughed, said she couldn't wait anymore, and left. II 73-74; II 133-36. Mr. Barlow then called a cab for her and paid the cabbie. II 74. He asked for her phone number; she gave him a fake one. II 74.

Rather than take the cab all the way home, she stopped at a party store (even though it was in a "kind of dangerous" neighborhood, II 141) and called her mother. She thought arriving at home in a cab would upset her mother. II 139. Dawn Marty had already gone to Ellen Howard's house, though (II 76; II 121-22), and when Ms. Howard spoke to her mother on the

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[8] She admitted that there was a YMCA just down the street, and that she could have gone there. II 119.

phone, telling her "what happened," her mother "flipped out." II 76. Later that night, she talked to a police officer and went to a hospital for an exam. II 78. She would later identify Troy Barlow from both a photographic and a corporeal lineup. II 83.

—the other prosecution evidence

No one answered when, sometime late on February 4th or early the next day, Police Officer **Anthony Perrin** went to the address on Fremont he got from speaking to Ellen Howard and knocked on the door. II 176.

Ms. Howard had told him that Dawn Marty had returned to the apartment after going to Burger King, but had *not* mentioned Dawn leaving and returning yet again. II 178.

Karen Ray examined Ellen Howard at Fieldstone Hospital. She did not find any lacerations to Ms. Howard's vagina. II 189. She did find superficial abrasions not inconsistent with consensual, but uncomfortable, intercourse. II 189.

Detective **David Adams** conducted both the photographic and corporeal lineups at which Ms. Howard made her identifications. III 5-13.

The defense case

Troy Barlow's description of the events of February 4th was in many ways similar to Ellen Howard's, but differed in a few important respects. He had met Dawn Marty and Ellen Howard at a party, and asked Dawn for a ride home. III 18. Both women had come to his apartment. III 20. The three of them played games on his computer for a while. III 21. They were joined by two friends of a neighbor, who came up to visit. III 20. Troy and Ellen were mutually attracted, and they went into the bathroom and started kissing. III 22. Dawn Marty did *not* go with them. III 23. When he touched Ellen's breasts, she continued to kiss him. III 23. After Dawn went to Burger King for food, he jokingly asked Ellen to "get naked," and was surprised when she did. III 25. She walked around and acted silly. III 26. She bent over a chair, at his request, but he didn't touch her. III 26. When Dawn returned, Ellen rushed to the bathroom and dressed. III 27.

Later, the two men and Dawn decided to leave. III 28. Ellen said goodbye to Dawn. III 28. He and Ellen then went to the bedroom and had sex. III 29. When they were finished, he asked her to leave, saying that the building did not permit overnight guests. III 29. He called a cab, paid the cabbie five dollars (II 29), and got her phone number (II 35). He was surprised when the phone number turned out to be fake. II 35. He was astonished to learn he was accused of rape. III 17.

ARGUMENT

I. BECAUSE THE COMPLAINANT'S TESTIMONY DID NOT ESTABLISH THAT TROY BARLOW USED FORCE OR COERCION TO ACCOMPLISH THE SEXUAL CONTACT UNDERLYING THE CHARGE, MR. BARLOW'S CONVICTION OF FOURTH-DEGREE CRIMINAL SEXUAL CONDUCT IS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

Introduction and issue preservation

The prosecution argued that Troy Barlow committed fourth-degree criminal sexual conduct (CSC) when he touched Ellen Howard's breasts in the bathroom, and/or when he touched her genitals in the kitchen. After the evidence was in, defense counsel moved for a directed verdict on this charge because, counsel pointed out, there was no evidence to show that Mr. Barlow had used force or coercion to accomplish the touchings. Ms. Howard had testified that in her mind she did not consent to the touchings, but not that she communicated her nonconsent or that Mr. Barlow used force or threats to make her comply. The judge denied the motion.[9]

Standard of review

The standard for reviewing insufficient-evidence claims was set forth in People v Hampton, 407 Mich 354, 368 (1980):

> "[T]he trial judge when ruling on a motion for a directed verdict of acquittal must consider the evidence presented by the prosecution up to the time the motion is made, view that evidence in a light most favorable to the prosecution, and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt, Jackson [v Virginia, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979)]" (some internal citations omitted).

[9] That part of the transcript that sets forth the judge's reasons is included as an appendix to this brief.

"[T]he Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" People v Patterson, 428 Mich 502, 525 (1987) (quoting In re Winship, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970)).

Questions of statutory interpretation are reviewed de novo. People v Mass, 464 Mich 615, 622 (2001).

Argument

Troy Barlow was not guilty of the "force or coercion" form of fourth-degree CSC because he used neither force nor coercion. The prosecution charged Mr. Barlow of violating MCL 750.52e(1)(b), which proscribes engaging in sexual contact when "force or coercion is used to accomplish the sexual contact." MCL 750.520e(1)(b) further explains that "force or coercion" includes, but is not limited to,

> "(i) When the actor overcomes the victim through the actual application of physical force or physical violence.
> (ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute that threat." MCL 750.520e(1)(b).[10]

Mr. Barlow did not use force to accomplish the sexual touchings at issue. The force needed to "accomplish" a proscribed sexual contact is more than just the force incidental to the physical act involved in the contact itself:

> "[T]he 'force' contemplated . . . does not mean 'force' as a matter of mere physics; i.e., the physical interaction that would be inherent in an act of sexual [contact] . . . . It must be force to allow the accomplishment of sexual [contact] when absent the force the [contact] would not have occurred. In other words, the requisite 'force' . . . does not encompass nonviolent physical interaction in a mechanical sense that is merely incidental to an act of sexual

[10] The statute lists other examples of "force or coercion," but these are the two that are pertinent here and that the jury was instructed upon. See III 93, 94-95.

> [contact]. Rather, the prohibited 'force' encompasses the use of force against a victim to either induce the victim to submit to sexual [contact] or to seize control of the victim in a manner to facilitate the accomplishment of sexual [contact] without regard to the victim's wishes." People v Carlson, 466 Mich 130, 140 (2002).[11]

Here, when describing the bathroom and kitchen touchings, the complainant did not mention anything even resembling the force contemplated by the statute. With respect to the incident in the bathroom, she said she did not remember being forced to go there (II 96-97; 101), that while there she did not remember telling Mr. Barlow not to touch her (II 104), and that she did not walk away only because her friend Dawn was standing between her and the door (II 102-03), not because Mr. Barlow tried to keep her from leaving (II 102).[12] With respect to the incident in the kitchen, she said that Mr. Barlow either asked or told her to undress, she couldn't remember which (she did remember that either way, he seemed nice about it), that he told her to lean over a chair, and that he then touched her genitals. She did not describe any force at all except that inherent in the touching.[13]

Nor did the complainant mention the kind of coercion described by the statute, overt threats to use force or violence. She admitted that there were no explicit threats. II 114.

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[11] Carlson was a case involving a charge of third-degree CSC, not fourth, and so it spoke of penetration rather than contact. However, the Legislature makes no distinction between the "force or coercion" required to prove third-degree CSC and that required to prove fourth. Compare MCL 750.520d(1)(b) and MCL 750.520e(1)(b).

[12] To the extent that Judge Sindt's ruling on the directed-verdict motion implies that Mr. Barlow prevented Ms. Howard from moving away from him in the bathroom ("she said she attempted to move away from and get away from the Defendant in the bathroom," III 59), that implication is clearly wrong. Ms. Howard specifically testified that she was unable to move away from Mr. Barlow because Dawn Marty was in the way (II 53), and that Mr. Barlow did nothing to try to prevent her from leaving (II 102).

[13] The Court of Appeals concluded that Mr. Barlow used force to touch the complainant's breast while they were in the bathroom because she tried to step away from him (but could not because her friend was standing in the way). Opinion at 3. That conclusion flies in the face of Carlson, supra. Whether or not the complainant tried to avoid the contact, merely touching her breast was clearly not force independent from the sexual contact, because the sexual contact was the touching of the breast itself.

The prosecution's trial theory seemed to be that Mr. Barlow's behavior amounted to *implied* coercion—that the complainant submitted to Mr. Barlow's touchings only because she feared what would happen if she did not, that the fear was reasonable, and that Mr. Barlow was responsible for generating it. The precedent for the prosecution's theory is a decision of the Court of Appeals that was carefully limited to facts that are easily distinguishable. People v McGill, 131 Mich App 465 (1984). In McGill, the defendant had used the pretext of a babysitting job to lure the 13-year-old complainant to drive with him to a remote location. There, 40-45 minutes by car from the complainant's home and nowhere near anyone the complainant knew, the defendant asked the complainant to join him in the front seat, offered to help her with a modeling career, and began to touch her. Even though he twice touched her leg and she twice told him to stop, he persisted. He put his hands inside her underpants on the pretext of checking for an appendectomy scar; when she told him to stop he did, but then, having told her he had been in jail, he began to fondle her breast. The complainant testified that she was afraid. Id. at 468-69. Under these circumstances, the Court held, the defendant's actions were sufficient to create a "reasonable fear of dangerous consequences," and thus amounted to coercion. Id. at 472, 473.

A "reasonable fear of dangerous consequences" exists, according to McGill, when it can be inferred that (i) under the totality of the circumstances, a coercive atmosphere existed, (ii) the defendant knew, or should have known, that his actions were coercive, and (iii) the complainant reasonably feared dangerous consequences. Id. at 474. Fear alone is not enough; the fear must be both reasonable and foreseeable. Id. Moreover, McGill took pains to make clear that the complainant's age was central to its decision—"defendant knew, or should have known, his actions were coercive **to a child**"; "[w]e believe her fear to have been reasonable given the

vulnerable position of a **young girl** taken to an isolated and distant location by an older and stronger male," id. at 474 (emphasis added)—and that a case involving an older complainant might not yield the same result:

> "We do not hold that the type of actual conduct described in the instant case will always satisfy the 'force or coercion' element. Were the victim older or had the undesired touching occurred in a place from which the victim could easily leave or from which she could summon help, a fear of dangerous consequences might not be deemed reasonable and an atmosphere of coercion might not exist." Id. at 474-75.

The facts here are easily distinguishable from those in McGill, and lend no support for the inference that a coercive atmosphere existed or that this complainant's fear of dangerous consequences, though perhaps real, was in any way reasonable. The complainant here was 17, not 13; she was a young woman, not a child. She had not been lured to a remote location by the defendant; she chose to go there with a friend. She was not prevented from leaving or summoning help; as she herself acknowledged, she could have left had she been willing to walk home or to insist that her friend take her, and she could have used the phone to call for a ride.[14] Nor, moreover, did she experience the coercion inherent in touchings that persist even when the toucher has been told to stop; she did not remember saying no to Mr. Barlow in the bathroom (II 104), and she never mentioned saying no to him in the kitchen. Her fear, however real, was not reasonable. Instead, it was consistent with the "panic attacks"—i.e., irrational fear—that she volunteered she was prone to suffer.[15] II 114; II 72.

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[14] She even admitted that she didn't know why, after the bathroom incident, she didn't just leave. II 104.

[15] Also distinguishable are People v Kline, 197 Mich App 165 (1993), in which (unlike here) the defendant persisted in acts of touching and penetrating even though the complainant, his sixteen-year-old stepdaughter, asked him to stop, and People v Cowley, 174 Mich App 76 (1989), in which (unlike here) the defendant blocked the complainant's path and grabbed her arm. The present case is more like People v Berlin, 202 Mich App 221 (1993), in which the Court held that a defendant who "took" the complainant's hand and "placed it" on the defendant's crotch had not used force or coercion.

The prosecution failed to prove that Troy Barlow used force or coercion to accomplish either of the alleged sexual contacts. His conviction must be reversed.

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant asks this Honorable Court to either grant this application for leave to appeal, or any appropriate peremptory relief.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

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Date: November 5, 2003

APPENDIX A

Court of Appeals Opinion

18778
D. BAKER

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

TROY ANTHONY BARLOW,

Defendant-Appellant.

UNPUBLISHED
September 11, 2003

No. 239038
Calhoun Circuit Court
LC No. 01-002179-FH

Before: Meter, P.J., and Talbot and Borrello, J.J.

PER CURIAM.

Following a jury trial, defendant was convicted of fourth-degree criminal sexual conduct, MCL 570.520e(1)(b). He was sentenced to a term of twenty-four to forty-eight months' imprisonment. Defendant appeals as of right, arguing that the evidence was insufficient for the conviction. We affirm.

In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). This Court views the evidence de novo in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

Viewed in the light most favorable to the prosecution, the evidence presented at trial is as follows. The seventeen-year old complainant accompanied her friend, Dawn Marty, to a party. Marty and the complainant left the party to drive defendant, whom they had just met and who was without a car, to his apartment. Defendant invited them into the communal kitchen area of his apartment complex. The complainant consumed half a cooler of wine. Two men came to the apartment building looking for another tenant and defendant invited them to meet his "female friends." The complainant next remembered that she was with defendant and Marty in the bathroom where defendant "was trying to grope" at her and he touched her breast underneath her shirt. The complainant stepped back but did not leave because Marty was standing against the door, watching. The complainant did not tell defendant to stop or express any words to that effect. When defendant attempted to touch Marty, Marty left the bathroom and the complainant followed her to the kitchen.

Defendant gave Marty some money to purchase dinner for her and the complainant. The complainant wanted to leave with Marty, but Marty told her to stay. The next thing the complainant remembered was being in the bathroom with defendant, who told her to get

undressed and come to the kitchen area. The complainant was afraid that defendant would hurt her, so she walked naked to defendant and the two men in the kitchen. The three men laughed and smirked at her and defendant told her to bend over a chair. The complainant testified that defendant "poked" her genital area as she was bent over the chair. The complainant testified that she did not tell defendant to stop; she stated that she was afraid and had tears in her eyes when she was bending over the chair. When Marty was heard returning to the apartment, defendant told the complainant to get dressed. The complainant ran to the bathroom. Shortly afterward, the complainant took Marty aside and told her what had happened and asked that they leave. Marty declined to leave. Instead, Marty and the two men left the complainant alone with defendant in the apartment. It is unclear from the record whether Marty left with the two men. The next thing the complainant remembered was that defendant raped her in his bedroom.

The jury acquitted defendant of the charge of third-degree criminal sexual conduct (sexual penetration using force or coercion) with respect to the alleged rape but found him guilty of fourth-degree criminal sexual conduct (sexual contact using force or coercion) with respect to the incidents in the bathroom and the kitchen. Defendant's sole issue on appeal is that the evidence was insufficient to establish "force or coercion," which is required to convict of fourth-degree criminal sexual conduct. Specifically, defendant argues that the complainant never showed unwillingness to participate in the sexual contacts in the bathroom or the kitchen, that there was no evidence to establish that he coerced or exercised any force on her and that the complainant's fear was not reasonably foreseeable to him.

A person is guilty of criminal sexual conduct in the fourth degree if he engages in sexual contact with another person and "force or coercion" is used to accomplish the act. MCL 750.520e(1)(b). Force or coercion occurs "[w]hen the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute that threat." MCL 750.520e(1)(b)(ii).

In *People v Carlson*, 466 Mich 130, 140; 644 NW2d 704 (2002), our Supreme Court held that the "force" contemplated by the criminal sexual conduct statute must be so great as to overcome the complainant and allow the accomplishment of the sexual act when, absent that force, the act would not have occurred. Although *Carlson* discussed the force required for third-degree criminal sexual conduct (sexual penetration using force or coercion), the force or coercion elements are the same in the criminal sexual conduct statute. *Id.* at 136 n 4. See *People v Alter*, 255 Mich App 194; 203; 659 NW2d 667 (2003). *Carlson* held that "the prohibited 'force' encompasses the use of force against a victim to either induce the victim to submit to [the sexual contact] or to seize control of the victim in a manner to facilitate the accomplishment of [the sexual contact] without regard to the victim's wishes." *Carlson, supra* at 140.

In *People v Premo,* 213 Mich App 406; 540 NW2d 715 (1995), this Court held that "coercion" within the meaning of fourth-degree criminal sexual conduct "may be actual, direct, or positive, as where physical force is used to compel act against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse." *Id.* at 411 (quotation omitted). In *People v McGill,* 131 Mich App 465, 468-469; 346 NW2d 572 (1984), the defendant was convicted of fourth-degree criminal sexual conduct for luring a thirteen year-old girl into his car and then driving her to an isolated area where he fondled her. This Court ruled that the defendant's actions were sufficient to create "a reasonable

fear of dangerous consequences" in the mind of the victim and thus amounted to coercion. *Id.* at 474.

In this case, defendant testified that the seventeen-year old complainant was timid. The complainant testified that she took a step back when defendant attempted to grope at her breast in the bathroom but that she could not leave because her friend, Marty, was in the way, watching the incident. This was sufficient evidence that defendant used actual force to accomplish sexual contact. Alternatively, the coercion element was satisfied when the complainant's friend left her alone in the apartment with defendant and two men, all of whom were strangers to her, without transportation in a neighborhood where it was unsafe to walk home. Defendant was much older and physically larger than the complainant. At that time, the complainant did not know where the telephone was to summon help. Defendant testified that he was joking when he asked the complainant to take off her clothes and come to the kitchen naked and that he was surprised when the complainant did so even though she did not know the two other men. However, he and the two men laughed and smirked at the complainant and defendant told her to bend over a chair and he proceeded to touch her genital area.

We conclude that the complainant's fear was reasonable given the vulnerable position of a young and timid girl left behind in an apartment with three adult men and with no means to safely leave. Although defendant testified that the sexual encounters were consensual and that the complainant was not timid, but appeared to be tipsy, when she came to the kitchen naked, we do not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748; amended 441 Mich 1201 (1992). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). From the above, the evidence was sufficient to meet the "force or coercion" elements for the conviction.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Stephen L. Borrello

APPENDIX B

Transcript excerpt

conduct of my client, cause my client did not make anything or do anything, even according to her, that made her reasonably afraid.

THE COURT: All right. Mr. -- Mr. Jaconette, what's your position?

MR. JACONETTE: Judge, Defendant touched the victim in the bathroom against her will. At that point, she was scared, terrified, afraid, mortified she said. And then, she is given a command by this man who's in the room -- Actually, she was in the kitchen, he was in the kitchen, according to her. She says that there was the request to take her clothes off, and she said that she was afraid of him. And I'm going to submit that fear is reasonable in light of all the circumstances present. The totality of the circumstances are she's in a room with this gentlemen, who she says had just touched her against her will in the bathroom. He is bigger than her, stronger than her, there are two other men in the room. And so, she feels compelled to do that. And -- and I think -- I think that fear was justified and so she did it. So, if -- if you look at this in the light most favorable to the non-moving party, there's no way this can be directed out.

THE COURT: I'm satisfied in the final analysis that there is sufficient evidence on the question or issue of force or coercion as respects Count IV, I'm sorry, as respects Count II, criminal sexual conduct fourth degree, that the

issue will be determined by the jury. There are -- there is actually two incidents suggested in the testimony from which the charge of criminal sexual conduct could be attributed. The first is the incident in the bathroom. And the second is the incident in the kitchen. And in each of those incidents, particularly respecting the incident in the bathroom, the victim's testimony, I'm -- I'm satisfied is sufficient to constitute evidence of force and coercion to send it to the jury. Specifically, she said she attempted to move away from and get away from the Defendant in the bathroom and was unable to do so. And that, coupled with the rest of the testimony, suggesting the entire scenario in which she was not voluntarily submitting to the contact, I'm satisfied constitutes sufficient force and coercion, both with respect to the incident in the bathroom, and then, subsequently, with respect to the incident in the kitchen. So, the motion for directed verdict seeking the dismissal of Count II is denied. Now, I've assembled jury instructions. I want the record to reflect that these have been discussed, that neither side is requesting any lesser offenses. That is correct statement from the People, is that not correct?

MR. JACONETTE: I don't believe any apply, Judge.

THE COURT: And that's a correct statement from the Defendant, as well?

MR. GILBERT: -- lesser offense, as far as the CSC

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

TROY ANTHONY BARLOW

Defendant-Appellant.
_____/

Supreme Court No. _____

Court of Appeals No. 239038

Lower Court No. 01-2179FH

PROOF OF SERVICE

DOUGLAS W. BAKER, being first sworn, says that on November 5, 2003, he mailed one copy of the following:

NOTICE OF HEARING
APPLICATION FOR LEAVE TO APPEAL
AFFIDAVIT OF REASONS FOR DELAY
PROOF OF SERVICE

TO:
CALHOUN COUNTY PROSECUTOR
161 E. Michigan Avenue
Battle Creek, MI 49014-4066

CLERK (proof only)
Calhoun County Circuit Court
County Justice Center
161 E. Michigan Avenue
Battle Creek, MI 49014-4006

CLERK (proof only)
Court of Appeals
Suite 14-300
3020 West Grand Boulevard
Detroit, MI 48202

DW Br
DOUGLAS W. BAKER

Subscribed and sworn to before me
November 5, 2003.

Amanda M Smith
Amanda L. Smith
Notary Public, Wayne County, Michigan
My commission expires: 10/4/2004
18778

STATE APPELLATE DEFENDER OFFICE

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November 5, 2003

Clerk
Michigan Supreme Court
P. O. Box 30052
Lansing, MI 48909

Re: **People v Troy Anthony Barlow**
Supreme Court No. _____
Court of Appeals No. 239038
Lower Court No. 01-2179FH

Dear Clerk:

Enclosed, for filing, please find the original and seven (7) copies of the following: Notice of Hearing; Application for Leave to Appeal; and Proof of Service.

Thank you for your cooperation.

Sincerely,

Douglas W. Baker
Assistant Defender

DB/JN
Enclosures

cc: Calhoun County Prosecutor
Court of Appeals Clerk (Grand Rapids) (proof only)
Calhoun County Circuit Court Clerk (proof only)
Mr. Troy Anthony Barlow
File · 18778